Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF ARIZONA,
PETITIONER,

-vs-

TRAVIS S. WRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Court of Appeals err, as a matter of federal constitutional law, in holding that a lawfully detained criminal defendant's consent to search is only voluntary if it was "knowing," and therefore uniformed police officers, who do not inform individuals of their right to refuse consent, who ask investigatory questions that may be incriminating in nature, and request to search an individual's belongings, cannot obtain a voluntary consent?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASON WHY THE WRIT SHOULD ISSUE 9

CONCLUSION 17

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES — PAGE

Colorado v. Connelly, 479 U.S. 157 (1986) 10, 11

Culombe v. Connecticut, 367 U.S. 568 (1961) 11

Florida v. Bostick, 501 U.S. 429 (1991) 4, 10, 11, 12, 16

Florida v. Royer, 460 U.S. 491 (1983) 10

Ohio v. Robinette
___ U.S. ___, 117 S. Ct. 417 (1996) . . 5, 6, 10, 12, 13, 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 10, 11, 12, 13-16

United States v. Brown, 102 F.3d 1390 (5th Cir. 1996) 13

United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996) . . 14

United States v. Laboy, 979 F.2d 795 (10th Cir. 1992) 13

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 16

United States v. Mendenhall
446 U.S. 544 (1980) 10, 12, 13, 16

United States v. One Lot of U.S. Currency
103 F.3d 1048 (1st Cir. 1997) 14

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) 14

United States v. Sanchez, 89 F.3d 715 (10th Cir. 1996) 11, 13, 16

United States v. Smith, 82 F.3d 241 (8th Cir. 1996) . . . 14, 16

United States v. Watson, 423 U.S. 411 (1976) 10, 16

United States v. White, 81 F.3d 775 (8th Cir. 1996) . . . 14, 16

United States v. Yusuff, 96 F.3d 982 (7th Cir. 1996) . . . 11, 16

People v. Michael, 45 Cal. 2d 751, 290 P.2d 852 (1955) . . . 14

Constitutional Provisions

U.S. Const. art. III, § 2 2

U.S. Const. amend. IV 3, 12, 14, 15, 16

U.S. Const. amend XIV 3

STATUTES

28 U.S.C. § 1254(1) 2

RULES

Rule 10.1, Rules of Supreme Court 2

OPINION BELOW

On September 26, 1996, the Arizona Court of Appeals issued its memorandum decision reversing and remanding the trial court's ruling denying Respondent's motion to suppress evidence. A copy of the Arizona Court of Appeals' memorandum decision is at Appendix A. The Arizona Supreme Court denied review of Petitioner's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the Arizona Court of Appeals' order and mandate reversing and remanding is at Appendix C.

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision of the Arizona Court of Appeals. (Appendix A.) The Arizona Court of Appeals issued its decision on September 26, 1996. On February 28, 1997, the Arizona Supreme Court denied the Petitioner's petition for review. (Appendix B.) Petitioner timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Procedural History of the Case

On August 18, 1994, the State indicted Respondent on one count of possession of dangerous drugs, a class 4 felony. Respondent filed a motion to suppress the evidence, alleging that the evidence produced was the result of an illegal stop, invalid consent, and an illegal search in violation of his constitutional rights. The trial court heard oral argument on the motion and made the following findings:

> In *Florida v. Bostick* - US, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), the United States Supreme Court held that so long as [a] reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. Therefore, when Officer Murphy approached the defendant in the bar and request[ed] that he "please step outside, I want to talk to you", [sic] the court finds that no reasonable suspicion was required and the encounter was consensual. The defendant was free to disregard the police and go about his business.
>
> The defendant, after a second officer had arrived, was asked if he had any weapons on him and he responded that he had a pocket knife. He was asked to empty his pockets, which he did and he was then asked [if] they could search his possessions. The defendant voluntarily consented to a search of his possessions and inside the wallet was a matchbook which contained a bindle which reportedly held illegal contraband. The defendant was then placed under arrest.
>
> Based upon a totality of the circumstances, the court concludes that the State has established by clear and positive

evidence that consent to the search was freely and intelligently given. Therefore, defendant's motion is denied.

After the trial court denied the motion to suppress, Respondent knowingly, intelligently, and voluntarily waived his right to a jury trial. The case proceeded to the bench, and the trial court found Respondent guilty of possession of a dangerous drug. The trial court suspended imposition of the sentence and placed Respondent on probation for a period of 2 years. In addition, the trial court left the matter as an undesignated felony, and upon Respondent's successful completion of probation, the matter was to be designated a class 1 misdemeanor.

On appeal, Respondent challenged the legality of the search of his belongings, and the admissibility of the evidence acquired after the search. On September 26, 1996, the Arizona Court of Appeals held that the search of Respondent's personal belongings had not been consensual and reversed Respondent's conviction.

Petitioner petitioned the Arizona Supreme Court for review. Petitioner presented the following issue for review:

> Did the court of appeals err in concluding that the trial court erroneously denied Appellant's motion to suppress where the evidence viewed in a light most favorable to

> sustaining the trial court's ruling showed that Appellant freely and intelligently consented to a search of his belongings by officers of the Prescott Police Department?

Petitioner further argued that this case was similar in nature to the recent case of *Ohio v. Robinette*, ___ U.S. ___, 117 S. Ct. 417 (1996), where a police officer continued investigation of the defendant following a routine traffic stop and searched the automobile pursuant to his voluntary consent. Petitioner urged, in the petition for review, that the Arizona Supreme Court adopt *Robinette* and extend it to encounters other than traffic stops. On February 28, 1997, the supreme court denied review.

Facts of the Case

Officer John H. Murphy of the Arizona, Prescott Police Department was on routine patrol in a known drug traffic area when he noticed Respondent involved in a possible drug transaction. Respondent was standing next to the driver's side of a van. Officer Murphy observed Respondent reach into his pocket and hand something to the driver of the van. Respondent looked over his shoulder and saw Officer Murphy. In an exaggerated and quick movement, Respondent whipped his hand out of the driver's side

window and put it back in his pocket. Respondent quickly headed towards the Sheldon Street Bar. Because of the frequency of drug-trafficking in that area, Respondent's age, and Respondent's anxious movements, Officer Murphy decided to investigate. He parked his car and followed Respondent into the bar. In the bar, Officer Murphy lost sight of Respondent and asked the bartender if she knew Respondent. The bartender told Officer Murphy that Respondent was a cook for the bar. Officer Murphy asked the bartender if she could have Respondent come out and talk to him. When Officer Murphy noticed Respondent, he motioned to him to come over. To avoid embarrassing Respondent in his place of work and to escape the noisy bar, Officer Murphy asked Respondent if he would mind stepping outside to answer a few questions. Respondent willingly agreed to step outside.

Once outside, Officer Murphy explained to Respondent that he believed Respondent was involved in a drug transaction. Respondent explained that he was only lighting the driver's cigarette. Officer Kabbel, who Officer Murphy had radioed for assistance, approached. Officer Kabbel asked Respondent if he had any weapons. Respondent

said that he had a couple of pocketknives. Officer Kabbel did not notice anything indicating that Respondent had a weapon posing serious danger, and therefore simply asked Respondent if he would mind emptying his pockets. Respondent, indicating that he did not mind, reached into his pockets and pulled out a number of items, including a pocketknife, a utility knife, and a wallet. Officer Kabbel then asked Respondent if he minded if they searched his belongings. Respondent said, "No, I don't mind; go right ahead." Officer Murphy searched Respondent's wallet and found a pack of matches containing a "bindle," a folded piece of wax paper containing drugs. Respondent, looking surprised, responded that he did not know the drugs were there. Officer Murphy then placed Respondent under arrest.

During the course of the investigation, which lasted approximately 5 minutes, neither Officer Murphy nor Officer Kabbel drew their guns, made physical contact with Respondent, or told him he was under arrest. At no time during this questioning did Respondent tell the officers to leave him alone, that he did not want to speak with them, or that he had already answered their questions.

REASON WHY THE WRIT SHOULD ISSUE

This Court should grant the petition for writ of certiorari because the Arizona Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court, of several federal circuit courts of appeals, and other states that recognize that it is not unreasonable for officers to investigate possible suspects and ask for consent to search their belongings as long as they have not conveyed a message that compliance with their requests is required.[1] In particular, the Arizona Court of Appeals has adopted the position that in order to have effective consent to search, police officers must obtain "knowing" voluntary consent, which is in direct contrast to the long established principle that consent to search is effective if voluntarily and freely given.

This position that there must be a "knowing" voluntary right to refuse consent, and therefore uniformed police officers that ask investigatory questions and request to search a suspects belongings cannot obtain voluntary consent to search because the investigatory

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1. Because the search of Respondent's person was not preceded by an impermissible seizure of his person, Respondent's consent to the subsequent search was not infected by an unlawful detention.

stop creates a show of authority that is both necessary and essential, conflicts with the principles set out in *Ohio v. Robinette*, ___ U.S. ___, 117 S. Ct. 417 (1996); *Florida v. Bostick*, 501 U.S. 429 (1991); *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Watson*, 423 U.S. 411, 424 (1976); and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The Arizona Court of Appeals misapplies the crucial test set out in *Schneckloth* and its progeny that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." 412 U.S. at 227; *Robinette*, ___ U.S. at ___, 117 S. Ct. at 421. The court of appeals fails to apply the "objective reasonableness" test it carefully articulates in its decision, and instead finds that in order to have voluntary consent to search, free of duress or coercion, there must be a "knowing" voluntary right to refuse consent. In coming to this conclusion, the court of appeals explains that uniformed police officers asking questions regarding suspicious activity and requesting

to search a person's belongings cannot obtain voluntary consent because the "show of authority that is both necessary and essential" can only invite cooperation.

However, in *Schneckloth*, this Court relied on confession cases as a framework for determining whether or not a suspect had voluntarily consented to a search. 412 U.S. at 223–27. This Court noted that none of those cases turned on the presence or absence of a single controlling criterion, but rather given all the surrounding circumstances, the question was did the police coerce the consent. *Id.* at 226, 229. Thus,

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, *if his will has been overborne and his capacity for self-determination critically impaired*, the use of his confession offends due process." Culombe v. Connecticut, 367 U.S. 568, 602.

Schneckloth, 412 U.S. 218, 225–26 (emphasis added) (citations omitted); *Connelly*, 479 U.S. at 167 (critical inquiry in determining voluntariness is whether police conduct constituted overreaching that resulted in the suspect's will being overborne); *United States v.*

Yusuff, 96 F.3d 982, 985 (7th Cir. 1996), (in determining whether consent to search was voluntary, the court should determine whether the suspect's will was overborne by police action), *cert. denied*, ___ U.S. ___, 117 S. Ct. 999 (1997). This crucial test is based on a standard of a reasonable person, innocent of any crime, who would reasonably believe that he was not free to leave. *Bostick*, 501 U.S. at 437-38; *United States v. Sanchez*, 89 F.3d 715, 717-18 (10th Cir. 1996). The rule is universal and applies to all encounters that take place on a city street, in an airport lobby, on a bus, or in an automobile. It is well established that the vitality of the Fourth Amendment is "reasonableness." *Robinette*, ___ U.S. at ___, 117 S. Ct. at 421.

In *Bostick*, this Court found that officers, who boarded a bus to ask questions, examine identification, and request consent to search luggage, did not coerce consent as long as they did not convey a message that compliance with their requests was required. 501 U.S. at 437-40. In *Mendenhall*, this Court found that the defendant voluntarily consented to accompany DEA agents from an airport terminal to an office for questioning regarding possession of

narcotics. 446 U.S. at 588. In *Schneckloth*, the defendant argued that such a consent could not be valid unless the defendant knew that he had a right to refuse consent. 412 U.S. at 227. This Court rejected that argument, concluding that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Id.* This Court reiterated this holding in *Robinette*, explaining that it would be unrealistic to require police officers to always inform detainees that they are "free to go" before a consent to search may be deemed voluntary. *Robinette*, ___ U.S. at ___, 117 S. Ct. at 421. Factors that would lead a reasonable, innocent person, as opposed to a person knowingly carrying contraband, to believe he was free to disregard the police officer would include:

> the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed space; and absence of other members of the public.

Sanchez, 89 F.3d at 718 (citing *United States v. Laboy*, 979 F.2d 795, 798-99 (10th Cir. 1992)). None of these factors were present in this case.

Therefore, it is clear that the fact that Respondent was not informed of his right to refuse consent does not make the consent involuntary. *Robinette*, ___ U.S. at ___, 117 S. Ct. at 421; *Mendenhall*, 446 U.S. at 555; *Schneckloth*, 412 U.S. at 227; *United States v. Brown*, 102 F.3d 1390, 1397 (5th Cir. 1996), *cert. denied*, No. 96-8197, 1197 WL 121074 (1997); *United States v. Peterson*, 100 F.3d 7, 10 (2d Cir. 1996). In essence, if this Court were to adopt the holding of the Arizona Court of Appeals, any defendant who was the subject of a search pursuant to his consent "could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent." *Schneckloth*, 412 U.S. at 230. This Court should grant the petition for writ of certiorari so that it can preserve its longstanding philosophy that:

> "[i]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquires, although courteously made and not accompanied with any assertion of a right to enter or

> search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority." People v. Michael, 45 Cal.2d at 754, 290 P.2d at 854.

Schneckloth, 412 U.S. at 230–31; *United States v. One Lot of U.S. Currency*, 103 F.3d 1048, 1053 (1st Cir. 1997) (there is no Fourth Amendment claim when an officer simply asks a few questions to a civilian who voluntarily allows the encounter to continue); *Peterson*, 100 F.3d at 10 (in a consensual encounter, officer may permissibly ask questions, such as why the suspect is at that location, and may make requests for identification and permission to inspect belongings); *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996) (an officer's asking questions that might elicit incriminating answers is irrelevant to whether an encounter is consensual); *United States v. Smith*, 82 F.3d 241, 243 (8th Cir.) (a consensual encounter did not end when the officer asked the defendant to search his jacket and the defendant handed the jacket to the officer), *cert. denied*, ___ U.S. ___, 117 S. Ct. 154 (1996); *United States v. White*, 81 F.3d 775, 779 (8th Cir.) (the Fourth Amendment is not implicated simply because a police officer approached an

individual and asked a few questions or requested permission to search an area, even if the officer had no reason to suspect criminal activity), *cert. denied*, ___ U.S. ___, 117 S. Ct. 518 (1996). Consent searches are part of the standard investigatory techniques of law enforcement agencies. *Schneckloth*, 412 U.S. at 232–33. As this Court has recognized, "[t]here is a vast distinction between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Id.* at 241. This Court has announced that the Fourth Amendment should be interpreted to encourage individuals to consent to a search:

> [I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

Id. at 244 (citations and quotations omitted). The circumstances that prompted the initial request to search Respondent's possessions were simply a logical extension of investigative police questioning.

The Arizona Court of Appeals decision, which adopts the position that there must be a "knowing" voluntary consent, rather

than consent which is freely and intelligently given, is contrary to the decisions of this Court, federal circuit courts of appeals, and other states. *See Robinette*, ___ U.S. at ___, 117 S. Ct. at 421; *Bostick*, 501 U.S. at 439; *Mendenhall*, 446 U.S. at 558; *Watson*, 423 U.S. at 424; *Schneckloth*, 412 U.S. at 248; *Yusuff*, 96 F.3d at 985; *Sanchez*, 89 F.3d at 718–19; *Smith*, 82 F.3d at 243; *White*, 81 F.3d at 780. "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Mendenhall*, 446 U.S. at 554 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). If this Court permits the rule adopted by the Arizona Court of Appeals to stand, then police officers will not be able to obtain voluntary consent to search a suspect's belonging unless the suspect, without request, empties his pockets spontaneously.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FILED: SEP 26, 1996

STATE OF ARIZONA	)	1 CA-CR-95-0826
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	MEMORANDUM DECISION
	)	(Not for Publication - Rule 111,
TRAVIS S. WRIGHT,	)	Rules of the Arizona Supreme
	)	Court)
Appellant,	)	
	)	

Appeal from the Superior Court of Yavapai County

Cause No. CR 94-0440

The Honorable Raymond W. Weaver, Jr., Judge
The Honorable William T. Kiger, Judge *Pro Tempore*

REVERSED AND REMANDED

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G R A N T, Judge

Travis S. Wright ("Defendant") appeals from his judgment and sentence for Possession of Dangerous Drugs, a class 4 felony. For the reasons that follow we reverse the denial of Motion to Suppress evidence and remand for action consistent with this decision.

SUMMARY OF THE FACTS AND PROCEDURE

Defendant was indicted by a Grand Jury and convicted at a bench trial for Possession of a Dangerous Drug, a class 4 felony. He was placed on probation for two years. The arresting officer ("Murphy"), as he was driving by in his police vehicle, witnessed what he believed to be a suspicious interaction between Defendant and the driver of a parked van. Defendant, standing outside and adjacent to the van, placed his hand in his pocket, then placed the same hand in the passenger cabin of the van, then withdrew his hand. At trial, Murphy testified he was unable to see what, if anything, was transferred. He further testified he was acting on a "hunch." Murphy testified that Defendant fit the right criteria of a "probable person" that might be using drugs. He further testified that if it had been two old ladies his suspicions would not have been aroused and he would not have stopped.

Murphy then followed Defendant into the Sheldon Street Saloon where Defendant was employed. He asked Defendant to step outside the bar so they could talk for a moment. Once outside, Murphy told Defendant that he thought Defendant had been involved in a drug transaction. In response to Murphy's questions concerning the insertion of his hand into the passenger compartment of the van, Defendant stated he was lighting a cigarette for the driver, who was a regular customer of the bar.

Murphy radioed for assistance and was joined by fellow police officer Kabbel ("Kabbel"). Kabbel asked if Defendant had any weapons on his person. Defendant produced a pocket knife and a utility knife. The officers did not do a customary "pat down" of Defendant. Kabbel then asked Defendant to empty the contents of his pockets. Defendant complied. Kabbel and Murphy after searching the contents of Defendant's pockets, asked Defendant if he minded if they looked through his belonging and Defendant assented. Kabbel and Murphy discovered a small amount of methamphetamine in a matchbook located within Defendant's large "Harley-Davidson" wallet.

At trial, Defendant argued the search was illegal and moved to suppress the evidence of the methamphetamine. The prosecution argued that the search was consensual. The trial court ruled that the initial encounter between Defendant and Murphy was consensual under *Florida v. Bostick*, 501 U.S. 429 (1991). The trial court stated that Murphy had acted primarily on a "hunch," but held nonetheless that Defendant had "voluntarily consented" to the search of his possessions. In addition, the court held that the state had established by "clear and positive evidence that consent to the search was freely and intelligently given." Finally, the trial court found Defendant had been free to disregard Murphy's request to step outside the bar. The trial court then denied Defendant's Motion to Suppress and admitted the methamphetamine into evidence.

DISCUSSION

The issue presented in this appeal is:

1. Whether Defendant consented to a search of his person by officers of the Prescott Police Department.

1. Standard of review.

We will not reverse the trial court's ruling on a motion to suppress on appeal absent clear and manifest error. *State v. Oliver*, 169 Ariz. 589, 593, 821 P.2d 250, 254 (App. 1991) (citing *State v. Clevidence*, 153 Ariz. 295, 736 P.2d 379 (App. 1987)). However, whether a person has been seized by police is a mixed question of fact and law. The "clear and manifest error" standard applies only to questions of fact, the applicable standard of review for questions of law is "*de novo.*" *In the Matter of the Appeal in Maricopa County,* Juvenile Action No. JT30243, 220 Ariz. Adv. Rep. 52 (App. 1996) (citing *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *State v. Winegar*, 147 Ariz. 440, 445, 711 P.2d 579, 584 (1985)). Therefore we accept the facts found by the trial court and our review of the legal conclusion to be drawn from those facts is *de novo.* In reviewing the correctness of the ruling on the Motion to Suppress, we look only at the evidence presented at the suppression hearing. *State v. Fimbres*, 152 Ariz. 440, 441–42, 733 P.2d 637, 638–39 (App. 1986). We view the facts in the light most

favorable to the trial court's ruling. *State v. King,* 140 Ariz. 602, 603, 684 P.2d 174, 175 (App. 1984).

2. Encounters and stops.

The *Bostick* rule provides that "a seizure does not occur simply because police officer approaches an individual and asks a few questions." *Florida v. Bostick,* 501 U.S. 429, 434 (1991). Police do not need a reasonable suspicion to initiate a consensual encounter with a person. *Id.* at 439. An encounter is consensual, and Fourth Amendment scrutiny is not implicated, if a reasonable person would know that he may disregard the police and simply walk way. *Id.* at 434 (citing *California v. Hodari*, 499 U.S. 621, 628 (1991)). Fourth Amendment scrutiny is only triggered if the encounter loses its consensual nature. *Id.* at 434.

In *Bostick*, two police officers boarded a public bus at random and without an articulable suspicion, questioned Bostick, 501 U.S. at 431. The police requested Bostick's consent to search his luggage for drugs, and advised him of his right to refuse. *Id.* at 432. Bostick gave his permission, and the officers arrested him after discovering cocaine in his luggage. *Id.* The trial court denied a

motion to suppress the evidence as a violation of the Fourth Amendment. *Id.* The Florida Court of Appeal affirmed, but certified a question to the state supreme court as to whether police, without articulable suspicion, could board a bus and ask at random for and receive consent to search passengers' luggage when they advised the passenger that he had a right to refuse consent to search. *Id.* That court adopted a *per se* rule that routine bus boarding for the purpose of questioning and searching the belonging of passengers was unconstitutional. *Id.* at 433. The U.S. Supreme Court held that the Florida Supreme Court erred by adopting a *per se* rule that every encounter on a bus is a seizure. *Id.* at 440. Thus, in striking down the Florida *per se* rule, the Court stated that the appropriate test for determining whether an encounter with police is a seizure under the Fourth Amendment is whether, taking into account all of the circumstances surrounding the encounter, a reasonable passenger would feel free to decline the officers' requests or otherwise terminate the encounter. *Id.* at 436.

In the aftermath of *Bostick*, the Ninth Circuit identified three categories of encounters or stops. *Morgan v. Woessner*, 997 F.2d

1244, 1252 (9th Cir. 1993). First, in a "consensual exchange," police may stop a person for questioning at any time, so long as a reasonable person would recognize he is free to decline the officers' requests or otherwise terminate the encounter. *Id.* (citing *Bostick*, 501 U.S. at 436). Consensual exchanges need not be supported by any suspicion that the individual was engaged in criminal activity, nor are they considered seizures for purposes of the fourth Amendment. *Id.* Second, police may stop or "seize" a person for brief, investigatory stops. *Id.* This class of stops is not consensual and must be based on "'reasonable suspicion.'" *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)); *United States v. Holzman*, 871 F.2d 1496, 1502 (9th Cir. 1989)). Third, police may stop or seize a person for the purpose of a full-scale arrest. *Id.* An arrest stop constitutes a seizure under the Fourth Amendment and must be supported by probable cause. *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 148–49 (1972)). Here, only the first and second categories above are relevant to our analysis of Murphy's initial contact with Defendant.

3. Investigatory Stop.

An investigatory stop must be supported by reasonable suspicion based on rational inferences from specific and articulable facts that the individual to be questioned has committed or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). When the police, "by means of physical force or show of authority, [have] in some way restrained the liberty" of a person, we may conclude that a seizure has occurred. *Id.* at 19 n. 16. Investigatory stops have been held to be non-consensual encounters and thus are governed by the protections offered by the Fourth Amendment. *State v. Master*, 127 Ariz. 210, 211, 619 P.2d 482, 483 (1980) (citing *Terry v. Ohio*, 392 U.S. 1 (1968) (when police stop a person on the street, and that person is no longer free to walk away, Fourth Amendment protections arise).

Investigatory stops are distinguished from consensual encounters by factors such as an ostentatious show of force or the assertion of authority, and the detention of the individual. Unlike the encounter in *Bostick*, which the Court characterized as permitting an objective belief by the individual that he could terminate the questioning, an

investigatory stop is a forcible detention by the officer placing the individual under his control. In determining whether a police officer acted reasonably in making an investigative stop, weight must be given not to the officer's inchoate hunch, but to particular, reasonable inferences which he is entitled to draw from the facts in light of his experience. *Terry*, 392 U.S. at 27; *State v. Fortier*, 113 Ariz. 332, 334, 553 P.2d 1206, 1208 (1976) overruled on other grounds by *State v. Jarzab*, 123 Ariz. 308, 312, 599 P.2d 761, 765 (1979); *State v. Jarzab*, 123 Ariz. 308, 310, 599 P.2d 761, 763 (1979).

A show of authority exists when a police officer's words and actions would cause a reasonable person to believe he or she is being ordered to restrict his or her movements; it is a necessary condition for seizure. *Hodari*, 499 U.S. at 628 (1991) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Hodari fled after police approached to question him regarding suspicious conduct. *Id.* at 621. During the chase, Hodari discarded what turned out to be crack cocaine just prior to being apprehended. *Id.* at 621, 623. At the juvenile proceeding, Hodari moved to suppress the crack cocaine

evidence as fruit of an illegal seizure. *Id.* at 621. The Supreme Court further held that although the police officers' pursuit constituted a show of authority, since Hodari did not comply with the injunction to halt, seizure did not occur until Hodari had been tackled. *Id.* at 629.

Here, Hodari is inapplicable to the instant case because the show of authority in this case was both necessary and sufficient condition to achieve the stop. Once outside the bar, Defendant was under the control of the police.

Murphy's questioning of Defendant was an investigatory stop rather than a consensual encounter. Despite the fact that Murphy testified the stop was based on a "hunch," Murphy observed a furtive hand gesture by Defendant with the driver of a parked van in the proximity of a reputed high drug transaction locality. Murphy also testified that Defendant's age and appearance matched the general description provided to him by drug enforcement officer. Thus, Murphy was able to articulate specific facts which support the assertion of reasonable suspicion.

A uniformed Murphy followed Defendant into the Sheldon Street Saloon. Once inside Murphy became aware that Defendant was an employee and motioned him to approach the officer. As Defendant approached, Murphy requested Defendant step outside to the parking lot for questioning. The trial judge found this to be consensual encounter and that the "Defendant was free to disregard the police and go about his business." We disagree. A reasonable person in Defendant's position would believe that these officers had an authoritative purpose in mind. *Maricopa County Juvenile Action No. JT30243,* 220 Ariz. Adv. Rep. at 54.

However, even if the initial contact between Murphy and Defendant "to step outside" was a consensual encounter and thus governed by the *Bostick* rule, the nature of the encounter subsequently changed thereafter during the course of the investigation. Murphy testified that he was acting under reasonable suspicion of a narcotics transaction and that Defendant was the target of the investigation. After Murphy and Defendant stepped outside, Murphy made allegations of a drug transaction and began questioning Defendant regarding Defendant's interaction with the

driver of the van. During the course of this questioning, Kabbel, also in uniform, appeared on the scene and participated in the investigation. Kabbel testified that he asked Defendant if he had any weapons on him. Defendant responded that he had a pocket knife. Kabbel asked Defendant to produce his pocket knife and that "if it was not produced after the request, I would have taken action." Defendant was then asked to empty his pockets, which he did. The officers then asked if they could search his possessions. A reasonable person in Defendant's place could not interpret this situation as one in which he would have had the right to unilaterally terminate the questioning and walk away.

Murphy's observation of suspicious conduct, the removal of Defendant from his place of employment, the authoritative effect of two uniformed officers, the nature of the allegations, the repetition of the questioning, and the objective impression that Defendant was not free to leave are sufficient to demonstrate that even if the exchange began as a *Bostick* consensual encounter, it subsequently evolved into an investigatory stop and is therefore governed by the law established by *Terry* and its progeny. While Officer Kabbel was

entitled to require Defendant to produce his pocket knife under *Terry* as necessary for officer safety, the search of the contents of a matchbook in Defendant's wallet exceeded the scope of *Terry* or a weapons search. Such a search can only be permitted by an alternative theory.

4. Consent Search.

Absent a warrant, a lawful arrest, or exigent circumstances, law enforcement may conduct a search of the person only if the person to be search voluntarily consents. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Whether a defendant's consent to a search is "voluntary" is a question of fact to be determined by examining the totality of the circumstances. *Id.* at 227. The standard for determining the scope of the suspect's consent to search is one of objective reasonableness; the court must ask "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *State v. Swanson,* 172 Ariz. 579, 584 n.5, 838 P.2d 1340, 1345 n.5 (App. 1992), *cert. denied,* 507 U.S. 1006 (1993) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, (1991)).

The prosecution has the burden of proof to demonstrate that consent was voluntary. *Bustamonte,* 412 U.S. at 222.

In *Bustamonte,* the Court listed a variety of factors which have been considered in determining whether a defendant's consent was voluntary: the youth of the accused; the lack of education or low intelligence; the lack of advice to the accused of his constitutional rights; the length of detention and the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep. *Id.* at 226 (citations omitted). *Bustamonte* is most noted for its holding that the defendant's knowledge of his right to refuse consent to search is not determinative in and of itself; it is merely one factor of many to be considered in determining whether defendant's consent was voluntary. *Id.* at 227; *State v. Smith*, 123 Ariz. 231, 241, 599 P.2d 187, 197 (1979).

In this case, we note that Defendant testified he did not know he had the right to refuse police interrogatories to produce the items on his person. During his testimony at the Hearing on the Motion to Suppress, the defendant made the following responses:

Q: If you had known that you had the right to refuse even to talk to the officers, would you have done it when he was accusing you of a drug transaction?
A: Yeah. I probably still would have talked with him.
Q: Would you have still let him search if you had known you had the right to refuse?
A: No, . . .

On these facts, we distinguish cooperation from consent in that consent implies the existence of choice, whereas cooperation was merely the only reasonable avenue available to Defendant. Defendant was cooperating rather than consenting when he emptied his pockets in the presence of police officers because he reasonably viewed he had no alternative. *See Maricopa County Juvenile Action No. JT30243,* 220 Ariz. Adv. Rep. at 52 (where a juvenile felt she had no alternative but to open her purse and hand the officer her cigarettes). At the officers' request, Defendant consented to the search of his possessions. Inside his wallet was a matchbook with a bindle which contained the illegal drug. However, consistent with *Butamonte,* Defendant's lack of knowledge concerning his right to refuse consent to the search is probative but not dispositive.

We dispose of the proposition that because the search of Defendant's person was made on an affirmative response to police

interrogatories, it implies consent. "Consent is ordinarily given as an acquiescence in an implicit claim of authority to search." *Bustamonte*, 412 U.S. at 289 (Marshall, J., dissenting). Justice Douglas noted that under many circumstances a reasonable person might read an officer's "May I" as the "courteous expression of a demand backed by the force of the law." *Bustamonte*, 412 U.S. at 275–76 (Douglas J., dissenting); *See Winegar,* 147 Ariz. at 445, 711 P.2d at 584.

The circumstances of this case clearly point to an escalating investigation. Inside the bar, Murphy motioned Defendant to approach and asked him to step outside. Assuming *arguendo* that Defendant freely consented to this request, Defendant was then subjected to repeated allegations and questioned regarding his interaction with the driver of the van. A second uniformed officer then interjected by asking if Defendant had any weapons on him. The subsequent production of Defendant's pocket knives as weapons and the request for Defendant to empty his pockets are indicia of an intensifying investigation. The mere fact that the officers' may have prefaced their request with the phrase "Do you mind" is not

sufficient under these circumstances to make the subsequent production consensual. *See Winegar,* 147 Ariz. at 447, 711 P.2d at 586 (1985), (mere fact police "ask" citizen to accompany them does not mean citizen can reasonably believe he or she is free to refuse).

The trial court in denying suppression of the evidence failed to apply the objective standard required by *Bostick* and *Swanson. Bostick,* 501 U.S. at 436–37; *Swanson*, 172 Ariz. at 584 n.5, 838 P.2d at 1345 n.5 (citation omitted). Instead, the court relied exclusively on the subjective response of Defendant to the police "request" to produce the contents of his pocket. An affirmative response to a police statement that is presented as a request in form, but is actually a directive in substance does not constitute objective consent. *Winegar,* 147 Ariz. at 447, 711 P.2d at 586. The court should have considered whether a reasonable person, having been removed from his place of work, confronted with allegations of illegal narcotics activity, and questioned repeatedly regarding those allegations and his possession of any weapons would "feel free to disregard police and go about his business." *Hodari*, 499 U.S. at 628 (citation omitted). We think not. The trial court displayed clear

and manifest error by failing to apply the objective standard to the request to search the effects on Defendant's person.

Consent which is either expressly or implicitly coerced or given under duress is not voluntary and the search is unconstitutional *State v. Ballesteros*, 23 Ariz. App. 211, 214, 531 P.2d 1149, 1152 (1975). In *Ballesteros* we outlined certain factors which tended to show that the consent was coerced:

1. Consent was made by an individual already arrested.
2. Consent was obtained despite a denial of guilt.
3. Consent was obtained only after the accused had refused initial requests for consent to search.
4. Consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered.
5. Consent was given while the defendant was handcuffed.

23 Ariz. App. at 214, 531 P.2d at 1152 (citations omitted).

In this case, we note that Defendant meets at least two of the factors described above. Defendant denied the allegations made by Murphy. Defendant denied participating in a drug transaction, not once, but several times during the course of the interrogation. He offered an alternative explanation for why he inserted his hand into the passenger compartment of the parked van. Murphy was driving by in a patrol car and could not have seen the details of this

encounter. The potentially coercive impact of uniformed officers accusing one of a crime is yet another factor of duress. *State v. Laughter*, 128 Ariz. 264, 266, 625 P.2d 327, 329 (App. 1980). Here, both Murphy and Kabbel were in uniform at the time of the investigatory stop.

We conclude by noting that Defendant testified, "If a police officer tells you to do something, you do it; or if he asks you to do something you just do whatever --." Thus, Defendant acted as any reasonable citizen was taught: cooperate with rather than confront law enforcement officers. This testimony and the testimony above is in direct conflict with the trial court's determination that consent was or could be "freely and intelligently given."

CONCLUSION

Based on the reasons above, we hold that the search of Defendant's personal items was not consensual, we reverse the denial for Motion to Suppress based on a consent search and remand for proceedings not inconsistent with this decision.

/s SARAH D. GRANT, Judge

CONCURRING:

/s NOEL FIDEL, Presiding Judge

/s WILLIAM F. GARBARINO, Judge

Appendix A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
FILED: SEP 26, 1996

STATE OF ARIZONA	)	1 CA-CR-95-0826
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	O R D E R
	)	
TRAVIS S. WRIGHT,	)	
	)	
Appellant,	)	
	)	

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its memorandum decision.

IT IS ORDERED that the memorandum decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the memorandum decision be sent to each party appearing herein or the attorney for such party and to The Honorable

Raymond W. Weaver, Jr., and The Honorable William T. Kiger, Judge *Pro Tempore*.

DATED this 26th day of September, 1996.

/s SARAH D. GRANT, Judge

Appendix B

Supreme Court

Noel K. Dessaint
Clerk of Court

State of Arizona

Kathleen E. Kempley
Chief Deputy Clerk

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

Telephone (602) 542-9396

February 28, 1997

RE: STATE OF ARIZONA vs. TRAVIS S. WRIGHT
Supreme Court No. CR-96-0645-PR
Court of Appeals No. 1 CA-CR 95-0826
Yavapai County No. CR 94-0440

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 26, 1997, in regard to the above-referenced cause:

ORDERED: State of Arizona's Petition for Review = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 28th day of February, 1997.

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Jacquelyn B. Eskay, Esq.
John C. Williams, Esq.
Glen D. Clark, Clerk of Appeals, Division One, Phoenix
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Appendix C

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
FILED: MAR 19, 1997

STATE OF ARIZONA,	)	
	)	1 CA-CR 95-0826
Appellee,	)	
	)	DEPARTMENT D
v.	)	
	)	Yavapai County
TRAVIS S. WRIGHT,	)	Superior Court
	)	No. CR 94-0440
Appellant,	)	

ORDER AND MANDATE

Grant Woods, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
And Jacquelyn B. Eskay, Assistant Attorney General
Attorneys for Appellee — Phoenix

John C. Williams
Attorney for Appellant — Prescott

The memorandum decision of this Court in the above matter was filed on September 16, 1996.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated February 26, 1997, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-96-0645-PR.

IT IS ORDERED in conformity with the memorandum decision attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the memorandum decision of the Court were mailed to the Clerk of the Superior Court for Yavapai County, Arizona, on March 19, 1997. A copy of the ORDER and MANDATE and a copy of the memorandum decision were mailed to the Honorable William T. Kiger, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the Yavapai County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1995, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED March 19, 1997.

s/_____

VICE CHIEF JUDGE

All of the foregoing directives were complied with March 19, 1997.

GLEN D. CLARK, Clerk
by:

Karen Scott
Deputy Clerk